SUPREME COURT, U.S.

No. 511

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In the

Supreme Court of the United States

OCTOBER TERM, A.D., 1966

JAMES HIGGINS, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The: Honorable Chief Justice and Associate Justices of The Supreme Court of The United States:

Petitioner, James Higgins, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, which affirmed the judgment of the District Court wherein petitioner was convicted of sales to a Federal agent of narcotic drugs, and transportation thereof.

OPINION BELOW

No opinion was rendered in the United States District Court for the Northern District of Illinois, Eastern Division. The opinion of the United States Court of Appeals is printed in the Appendix hereto.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 29, 1966. The Petition for Rehearing was denied on August 2, 1966. The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254 (1), 62 Stat. 928.

QUESTION PRESENTED

Where petitioner was charged and on trial for unlawful sales of narcotic drugs to a Federal narcotic agent; and, where petitioner's defense was a denial of the alleged sales and that the agents fabricated the charge and testimony of the alleged sales in reprisal for petitioner's refusal to become a Federal Narcotic Bureau informer; did not the trial court's exclusion of petitioner's defense, on the ground that such defense would constitute a hazard to the Federal Narcotic Bureau's policy of inducing law violators to become informers, and on the ground of the trial court's expressed opinion during the trial that petitioner was guilty of the sales, and on the further nebulous grounds of relevancy, violate petitioner's Fifth Amendment constitutional right of due process by excluding petitioner's defense, and petitioner's Sixth Amendment constitutional right to a trial by jury?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF CASE

Counts one and three of the four count indictment charged that petitioner on October 28th and November 10th, 1964, unlawfully sold a narcotic drug to Federal narcotic agent William Turnbou. Counts two and four charged that petitioner unlawfully transported the drugs referred to in counts one and three. Agent Turnbou testified that he purchased narcotics from petitioner on the two alleged dates. Petitioner denied that he made the alleged sales. During

petitioner's direct examination, as well as during Agent Turnbou's cross examination, petitioner proferred the following evidence, which evidence the trial court rejected and refused to permit the jury to hear or consider:

(1) Narcotic agents arrested petitioner on January 5, 1965, and attempted to enlist petitioner as a government informer.

(2) When petitioner told the agents he would cooperate as an informer, but that he might change his mind at any time, with no objection from the government, he was released from custody on his own recognizance.

(3) The agents gave petitioner a slip of paper with the names of two narcotic agents and an unlisted telephone number where he could reach them.

(4) Thereafter, the agents repeatedly contacted petitioner and gave him names of men whom petitioner should contact for the purchase of narcotics.

(5) In March, 1965, petitioner was indicted under the instant indictment after one of the agents told petitioner he knew that petitioner was not going to cooperate (A. 11-14; R. 122-151).[1]

REASONS FOR GRANTING THE WRIT.

Under the Due Process Clause of the Fifth Amendment and the Sixth Amendment constitutional right to a trial by jury, petitioner had a right to present his defense to the allegations of the indictment to the jury. Petitioner was denied this right. His defense to the alleged transportation and sales of the drugs to the agent was that he had not transported or sold drugs to the agent and that the agent

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[1] (A. 11-14) are the pages of the printed appendix of the record on appeal. (R. 122-151) indicates the pages of the original trial court proceedings, filed as the record on on appeal.

fabricated his testimony thereof in reprisal for petitioner's refusal to become a Federal Narcotic Bureau informer. Petitioner was unconstitutionally precluded from presenting his defense to the jury. The trial court should not have excluded petitioner's defense from the jury. The trial court was not the trier of the facts and when it excluded petitioner's defense, it denied petitioner due process and trial by jury.

The Court of Appeals acknowledged that the trial court could not usurp the function of the jury on the question of the guilt or innocence of the accused, citing *Greenberg* v. *United States*, 3 Fed. 2d 226 (7th Cir., 1924). The Court of Appeals held, however, that the proffered evidence had no bearing on petitioner's guilt or innocence and erroneously distinguished the instant case from *Greenberg*. In Greenberg, the Court held:

> ". . . all disputed issues of fact bearing on defendant's guilt are for the jury. Questions of reasonableness, and of probability in criminal cases are solely for the jury. The story of the defendant evidently appealed to the Trial Judge as a fairy tale—the product of a fertile imagination and an easy conscience. Inasmuch as it is not impossible, however, it should have gone to the jury for what it was worth."

Petitioner's defense was brought to the trial court's attention at an early stage in the proceedings, as is witnessed by the following colloquy outside the jury's presence:

> Mr. Smith (Petitioner's Attorney): Your Honor, the only thing I want to bring up is, and I didn't want to say it in front of the jury, I wanted to see what you thought of it, but it is my intention in cross examination (of agent Turnbou) to go into the following facts: Number one, that before the Commissioner, Higgins was charged with violation of Section 4704 (a). I am

not going to go into the minimum mandatory punishments or anything like that. I just want to go into the fact that he was charged with the lesser offense, or some phrase like that. He was then let out on his own recognizance bond, asked to be an informant, and when he doesn't come through as an informant he is indicted on the more serious charge.

The Court: I don't think this is relevant and material.

• • •

Mr. Smith: All right, then comes the question of motive. There are twelve people on the jury here. The question is why would an agent make a statement in conflict with the defendant?

The Court: But there is no conflict.

Mr. Smith: There will be.

The Court: You mean the defendant is going to testify that in fact that he did not—

Mr. Smith: Absolutely correct, that he did not.

The Court: That none of these things took place, this is all a figment of Mr. Turnbou's imagination?

Mr. Smith: He did not buy any narcotics from Agent Turnbou—

The Court: No; no sell.

Mr. Smith: Sell, that is exactly correct.

The Court: He never took the $100.00. He never took the $250.00? He never delivered any tinfoil packages?

Mr. Smith: Correct. Now the question of motive comes up, motive by the witness. The importance of that—

The Court: Mr. Smith, that may be part of your defense. It is not part of your cross examination of this witness's direct testimony." (A. 10-11)

Thus, the trial court was apprised of a disputed factual issue. The trial judge and the Court of Appeals decided that this controverted factual issue was not for the jury's consideration. Petitioner was thus limited to a bare denial of

his guilt and was precluded from fully presenting his defense.

In the clearly defined language of *United States* v. *Matot*, 146 Fed. 2d 197, P. 198-199 (2nd Cir., 1944), Judge Learned Hand, speaking for the Court, stated:

> "Although Matot's testimony was the only direct evidence upon his intent, it was not fair to confine him to a bare denial—never impressive in the mouth of the accused. He was entitled to corroborate that denial by any conduct which confirmed it. * * * The exclusion of evidence, which does not too much entangle the issues and confuse the jury, merely because of its logical remoteness from the issue, is always a hazard, and is usually undesirable. It is always hard to say what reasonable people may deem logically material, and all doubts should be resolved in favor of admission, unless some definite rule like that against hearsay makes that impossible."

The excluded facts offered by petitioner in support of his contention that he was innocent of the charges and that the whole of the government's case had been fabricated against him in reprisal for his failure to become a government informer, should have been submitted to the jury as facts bearing on the ultimate issue of his guilt or innocence. The evidence offered raised a disputed issue of fact, *i.e.*, whether the alleged narcotic sales in fact ever occured. The reasonableness of the government agent's alleged fabrication and the probability of the government agent fabricating a case against petitioner were issues solely for the jury's consideration.

No objection was raised by the government in the trial court or in the Court of Appeals that the proffered evidence would entangle the issues and confuse the jury. One basis for the exclusion was of relevancy, and under this nebulous guise petitioner's defense was kept from the jury's consideration. From petitioner's proffered evidence, the

jury may and could have concluded that petitioner was innocent of the charges. Therefore this evidence should have been submitted to the jury for whatever probative value the jury felt it was entitled.

In the instant case, as in *Matot,* petitioner was confined to a bare denial. Petitioner was precluded from corroborating his denial by the exclusion of evidence of his and the agents' conduct. Again, as in *Matot,* "all doubts should have been resolved in favor of its admission." Petitioner's defense was unconstitutionally emasculated and rendered inexplicably impotent.

In the first instance, the trial court rejected the evidence offered by petitioner because the trial court was convinced that petitioner was guilty of the offenses charged. The following colloquy occurred outside the jury's presence prior to the close of the evidence:

> The Court: I am saying to you, you are asking the jury to draw an inference which I conceive not to be permissive from the events. I am saying to you, in my judgment, if I were to permit this jury to hear evidence which you would argue to them is the basis for drawing an inference that the government agents lied in their testimony in the court because Mr. Higgins welshed on an agreement with them, this would be permitting Mr. Higgins to capitalize on his own liabilities to his defense and advantage in a criminal case on a basis which I conceive not to have any relevance or materiality or any probative value.
>
> Mr. Smith: You mention liability. What were his liabilities?
>
> The Court: The liability is that he made a deal and walked out on it.
>
> Mr. Smith: Because he was arrested on something he said he wasn't guilty of.
>
> The Court: *If he wasn't guilty, he should not have made a deal to be an informer.*

> Mr. Smith: We—none of us know what we will do when they start to talk about five, ten, or twenty years in jail. A lot of us would agree to help out, and it happens often.
>
> The Court: *I cannot conclude that Mr. Higgins agreed to help out and then walked out on it, when in fact he had nothing to do with it in the first instance.* • • • (R. 138-139)" (Italics supplied).

Thus, the facts proffered by petitioner as his defense were accepted and relied upon by the trial judge as proof of petitioner's guilt. Clearly, here, the trial court regarded the offered evidence as relevant, that is to say, relevant and material and of sufficient probative value to permit the trial judge to conclude therefrom that petitioner was guilty. Yet the trial judge, on the grounds of lack of probative value and materiality, excluded this same evidence, from which the jury may have conversely concluded that petitioner was innocent.

It is patently obvious from the following colloquy, that the trial judge also excluded the substance and gravamen of petitioner's defense because the trial court felt that such a defense would constitute a hazard to the Federal Narcotic Bureau's policy of inducing law violators to become informers:

> The Court: This is really capitalizing on your liabilities. If I permit you to do this, then every person arrested for a law violation who is invited to cooperate should immediately accept, and then refuse or fail to do so, and then when he is indicted and tried, charge the government agents with lying about what he did because he was invited to help himself, agreed to do so, and then walked out on his agreement. I don't think that has any probative value. If this becomes the law, then it will be a grave risk indeed for a defendant in a broadened investigation in the area in which the defendant is accused of violating the law

> because the minute he does, he gives the defendant a tool to imply that the subsequent testimony in the case has been falsified because he failed to live up to an agreement to cooperate in the first instance. (A. 135-136)

Here, the trial court denied petitioner's constitutional right to present his defense to a jury, because of the trial court's expressed, though unwarranted, concern with the effects that petitioner's defense might have on the national policy of Federal law enforcement and because of the trial court's concern with subsequent alleged offenders relying upon a similar defense.

Petitioner has not had his day in court!

CONCLUSION

It is therefore respectfully prayed that this Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 15446 SEPTEMBER TERM, 1965 APRIL SESSION, 1966

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JAMES HIGGINS, JR.,
Defendant-Appellant.

Appeal from the United States District Court, Northern District of Illinois Eastern Division.

June 29, 1966

Before KNOCH and SWYGERT, *Circuit Judges* and BEAMER, *District Judge.*

BEAMER, *District Judge.* Defendant appeals from a judgment convicting him after trial by jury on four counts of an indictment charging the sale of heroin on October 28, 1964 in violation of 26 U.S.C. 4705(a) [Count I] possession of heroin in violation of 21 U.S.C. 174 [Count II]: the sale of heroin on November 10, 1964; in violation of 26 U.S.C. 4705(a) [Count III]; and possession of heroin in violation of 21 U.S.C. 174 [Count IV].

The sole error asserted by defendant on this appeal is the trial court's refusal to permit the introduction of certain evidence on behalf of the defendant during the cross-examination of Narcotic Agent Turnbou and during the direct examination of the defendant. The excluded evidence was offered for the purpose of impeaching the testimony of Agent Turnbou.

Agent Turnbou testified that he was introduced to the defendant in a candy shop by an informant on October 28, 1964. Turnbou stated to defendant that he wanted to buy a quantity of heroin. After defendant agreed to sell some heroin. Turnbou, the informant, and the defendant returned to the candy shop later in the evening and Turnbou gave defendant $100 in marked money. Later, defendant met Turnbou and the informant in a tavern across the street and gave Turnbou a foil-wrapped package of heroin. Turnbou also testified that defendant made a subsequent sale of heroin to him for the same price at the candy shop on November 10, 1964.

Agent Vinsik testified that he observed Turnbou, the informant, and Higgins enter and leave the tavern, sweet shop, and candy store on the dates in question. However, Vinsik did not personally observe the transfer of money or heroin.

The defendant testified and denied that he had ever talked to Turnbou or sold narcotics to Turnbou or admitted to either Turnbou or Vinsik that he had sold narcotics. Defendant also testified that he had owned a sweet shop for about five years and had worked as a butcher and in a paint shop prior to that time. Defendant stated he had never been convicted of a felony.

During the cross-examination of Turnbou and during the direct examination of the defendant, defendant's counsel offered to prove, and the trial judge rejected, the following evidence:

(1) Narcotics agents at the time of Higgins arrest attempted to enlist Higgins as a Government informer.

(2) After Higgins told the agents he would do what he could to help, he was charged with offenses under 26 U.S.C. 4704(a) and with no objection from the Government was released on his own recognizance.

(3) Higgins was given a slip of paper with the names of two narcotics agents and an unlisted telephone number where he could reach them.

(4) The agents made repeated attempts to contact Higgins after the original arrest and gave him names of men he should contact for the purchase of narcotics.

(5) Two months later, Higgins was indicted for the same alleged sales of narcotics under 26 U.S.C. 4705(a), which involves heavier penalties than Section 4704 (a).
(A. 22-26)

Defendant offered this evidence for the purpose of impeaching the credibility of the testimony of Agent Turnbou. Defendant asserts this evidence tended to prove that Agent Turnbou had a motive or motives to falsify and, hence, was relevant on the issue of Turnbou's credibility. The trial court excluded the evidence on the ground that it was irrelevant and had no probative value for this purpose.

If the rejected evidence had no probative value as to the credibility of Turnbou's testimony, the trial court properly excluded the evidence both upon the cross-examination of Turnbou as well as upon the direct examination of the defendant. Evidence which has no probative value with respect to any issue, including credibility, is not admissible and the trial judge has the function and duty to exclude such evidence from the consideration of the jury. *Kansas City Star Co.* v. *U. S.*, 240 F. 2d 643 (8th Cir. 1957) cert. den. 1 L.Ed. 2d 1438; *U. S.* v. *Johnston*, 318 F. 2d 288 (6th Cir. 1963); *Ford* v. *U. S.*, 10 F. 2d 339 (9th Cir. 1926) aff'd 71 L.Ed. 793. Furthermore, the trial court has considerable discretion as to how and when bias may be proved and as to what collateral evidence for purpose of impeachment is material. *Hardy* v. *U. S.*, 335 F. 2d 288 (App. D.C. 1964); *Travis* v. *U. S.*, 269 F. 2d 928 (10th Cir. 1959); *U. S.* v. *Lawinski*, 195 F. 2d 1 (7th Cir. 1952). However, the court cannot usurp the function of the jury by substituting the court's own judgment for that of the jury with respect to the credibility of any witness or the reasonableness of any item of evidence which bears upon the guilt of the accused. *Greenberg* v. *U. S.*, 3 F. 2d 226 (7th Cir. 1924).

Accordingly, the question for decision on this appeal is whether the excluded evidence had probative value for the purpose of impeaching the credibility of Agent Turnbou. Defendant contended in the trial court that the excluded evidence could have been used to show that Agent Turnbou had a motive to falsify, namely bias or hostility with reference to the defendant resulting from the defendant's refusal to become an informant. Such bias, argues defendant, is further evidenced by the fact that defendant, after refusing to become an informant, was charged with violations of 26 U.S.C. 4705(a) which carries a heavier penalty than does 26 U.S.C. 4704(a) under which defendant was originally charged. Defendant's argument concerning Turnbou's bias overlooks the fact that the original charge brought against defendant under 26 U.S.C. 4704(a) involves the same essential illegal conduct as does 26 U.S.C. 4705(a). Both sections involve the unlawful transfer of narcotics. 4705(a) declares that "it shall be unlawful for any person to sell, barter or exchange, or give away any narcotic drugs except in pursuance of a written order . . . on a form issued . . . by the Secretary." 4704(a) states that "it shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package . . ." Although the penalties vary, the essential unlawful conduct under each section is the same. Accordingly, when the original charge was brought against defendant, defendant was accused by Turnbou of the same unlawful conduct which was the subject of Turnbou's testimony at this trial. However, defendant was accused of this conduct prior to the time defendant had refused to become an informant, that is, prior to the time Turnbou had any basis for harboring bias or hostility toward this defendant. Accordingly, the offer of proof concerning events subsequent to defendant's arrest had no probative value for impeachment of Turnbou's testimony about defendant's conduct and events which occurred prior to the time Turnbou had any motive to falsify resulting from bias or histility toward defendant.

Defendant, before this Court, has made an additional broader argument concerning relevance of the excluded

evidence. Defendant contends that the excluded evidence tended to prove that Agent Turnbou had a motive to falsify which arose prior to the time defendant was arrested and originally charged with a violation of 26 U.S.C. 4704(a). Defendant argues that the excluded evidence could have been used as a basis for showing that Turnbou had fabricated the entire case against defendant for the purpose of enlisting defendant as an ideal informant. Subsequently, when defendant refused to become an informant, Turnbou had to proceed with the case and had to testify falsely against defendant.

We hold that the excluded evidence had no probative value for this purpose. Evidence which shows only that an accused is arrested, asked to become an informant, and subsequently charged with a similar offense carrying a heavier penalty upon his refusal to become an informant does not tend to prove that the entire case against defendant was fabricated or that corroborated testimony about defendant's conduct prior to his arrest is false. A careful examination of defendant's offer of proof, together with all reasonable inferences therefrom, indicates that the excluded evidence did not tend to prove Turnbou had fabricated a case against defendant to obtain an informant. The mere fact that a person is arrested and asked to become an informant, without more, does not tend to prove that a case has been fabricated. Nor does the fact that the accused is later charged by a grand jury with a similar offense carrying a heavier penalty tend to prove that the case is fabricated. In sum, the conclusion sought to be established was not rendered more probable by virtue of the offered evidence. *Mutual Life Insurance Co.* v. *Hellman*, 145 U.S. 285, 36 L.Ed. 706, 12 S.Ct. 909 (1892). See also, McCormack, *Evidence*, Sec. 152.

Defendant places heavy reliance upon *Greenberg* v. *U. S.*, 3 F.2d 226 (7th Cir. 1924). However, in *Greenberg*, the court held that evidence *relevant* to the issue of defendant's guilt should not be excluded even though the trial judge may believe it to be incredible or a product of the imagina-

tion of the accused. The offered evidence in *Greenberg* was disbelieved by the trial judge and excluded from the jury although the evidence would have had a vital bearing on the issue of defendant's guilt, if believed by the jury. In the case at bar, the excluded evidence had no bearing on defendant's guilt or innocence nor did the evidence have any rational connection with the credibility of Agent Turnbou's testimony.

For these reasons, we find no error in the trial court's exclusion of the offered evidence under the facts and circumstances of this case.

The Judgment of the district court is affirmed.

AFFIRMED.

Petition for Rehearing denied on August 2, 1966.

• • • • • •

Section 174, Title 21, United States Code

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned. . . .
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Section 4705(a), Title 26, United States Code.

> "It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."